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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 703

IN RE ESTATE OF HARRIET A. MITCHELL,
Deceased.

EDWARD GUERIN,
Petitioner,

vs.

HAZEL M. GRIEFEN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT FOR THE FIRST DISTRICT OF ILLINOIS, AND BRIEF IN SUPPORT THEREOF.

WILLIAM S. KLEINMAN,
Attorney for Petitioner.

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Petition for Writ of Certiorari.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Edward Guerin respectfully prays for a writ of certiorari herein to review a certain final order of the Appellate Court for the First District of Illinois, being the higest court of said State in which a decision could be had. The judgment of the Appellate Court of Illinois was entered on May 22, 1940 and became final on June 12, 1940, when the Appellate Court denied a petition

for rehearing. Thereafter the Appellate Court granted a statutory certificate to the effect that there is fairly involved in the claim of the Petitioner more than $1500.00, thereby vesting jurisdiction in the Supreme Court of Illinois. A petition for leave to appeal to the Supreme Court of Illinois was duly filed on July 20, 1940; on October 16, 1940, that Court denied the prayer of the petition. This petition for certiorari, together with the certified transcript of the records of the Appellate Court and the Supreme Court are herewith filed in this Court, being within three months after denial of said petition by the Supreme Court of Illinois.

Summary and Short Statement of the Matters Involved.

The Petitioner is a brother of Harriet A. Mitchell, deceased. As one of her heirs at law and next of kin, he appealed from an order entered in the Circuit Court of Cook County, Illinois, admitting to Probate an unexecuted copy of a destroyed will of said deceased, as and for her last will and testament.

Harriet A. Mitchell departed this life on the 11th day of May, 1936. On May 19, 1936, letters of administration in her estate were issued by the Probate Court of Cook County to Louis G. Kailer, who duly qualified by having his bond approved. The heirs-at-law and next-of-kin of said deceased, consist of two brothers (including petitioner), two sisters, and the suriving heirs of a deceased half-sister. On January 10, 1938, almost 20 months after the issuance of letters of administration, Hazel M. Griefen, appellee herein, who is a niece of the deceased, and the daughter of one of the surviving sisters of said deceased, filed her petition in the Probate Court praying for the issuance of letters testamentary to her by virtue of her discovery of what she claims to be a pur-

ported copy of a will of Harriet A. Mitchell, the original of which is purported to have been executed on January 21, 1909. The basis for the petition is her allegation that said last will and testament "was thereafter destroyed under circumstances which did not amount to a revocation thereof within the provisions of the statute in such case made and provided, in that the same was not destroyed by the testatrix, Harriet A. Mitchell, herself or in her presence" (Rec. 2).

The estate consists of tangible personal property approximating $65,000 in value (Rec. 3).

The only testimony offered was on behalf of the respondent herein as the proponent of said purported copy, and consisted of the testimony of William S. Hefferan, who had been the lawyer for Mrs. Mitchell for many years, and is purported to have prepared and witnessed her will and to have thereafter destroyed it at her direction. The other witness was Mrs. William T. Anderson, whose maiden name was Ruth M. Burke, who in January 1909 was in the employ of Mr. Hefferan as his secretary, and is purported to have transcribed the original will and to have witnessed it.

To state the salient facts briefly, and assuming only for the sake of this statement that everything testified to by these witnesses to be true, we are confronted with the following set of circumstances: Mrs. Mitchell was a widow in 1909. On January 21, 1909, she went to the office of Mr. Hefferan, her attorney, for the purpose of making and executing her will, and for the further purpose of executing a petition as a preliminary step towards the adoption of her niece, the appellee herein. The witnesses testified that both instruments were prepared and executed that day. The executed will was enclosed by Mr. Hefferan in a white mailing envelope and deposited in his will box. The petition for adoption was never filed in any court and it remained in Mr. Hefferan's files, from which it was

taken and produced in court in this proceeding. Mrs. Mitchell made periodic visits to consult with Mr. Hefferan about various business and family matters. In the early part of June of 1914, Mr. Hefferan received a letter from Mrs. Mitchell, mailed from the Waldorf-Astoria Hotel in New York, which letter was typewritten and bore her written signature and contained the following message and direction.

> "I made a new will a few days ago, so kindly oblige me by destroying the one you have of mine" (Rec. 13).

Complying with this direction, Mr. Hefferan took the original will from his will box and from its envelope, tore up the will and threw it in his wastebasket (Rec. 39). Thereupon on June 15, 1914, he addressed a letter to Mrs. Mitchell, as follows:

> "Pursuant to instructions contained in yours of June 6th, sent to me from the Waldorf-Astoria, New York, I have destroyed your will which was left with me for safekeeping" (Rec. 15).

This letter was addressed and mailed to Mrs. Mitchell at her home in Chicago but as she was then away from the city, it was returned to Mr. Hefferan and he deposited it among his papers. Fifteen years later, on August 1, 1929, Mrs. Mitchell called on Mr. Hefferan, at his office, and during the course of that visit Mr. Hefferan handed her that original letter which had been returned to him by the postal department, in the original envelope as it was mailed to her. What then transpired is best understood, when stated in the words of the witness, as appears on pages 28 and 29 of the record.

> "Mrs. Mitchell was at my office on August 1, 1929, for some time and of course, I held a conversation with her. I know I handed her that document and I would not hand it to her without saying something

to her and I will try and tell you the best I can what I said to her. My recollection is that I told her after the receipt of her letter that I had written to her Chicago address telling her that I had carried out her instructions to destroy her will and that the letter had come back to me and here it was, and handed it to her. * * * She never mentioned her will to me after June 1914, except on the occasion when I handed her the letter in which I advised her that I had carried out her instructions to destroy her will. It was mentioned by me at that time. Here was a letter that had been sent back to me by reason of lack of address and it was received and that is all there was to it. It was not a subject for conversation. I carried out her instructions. I handed her the letter."

Mr. Hefferan appears to have made a record of this visit, for on his carbon copy of the letter he then handed to Mrs. Mitchell, which carbon copy is in evidence, Exhibit 4, (Rec. 15), appears this pencil notation in Mr. Hefferan's handwriting:

"8/1/29—Original of above was returned to me and today Mrs. Mitchell called at my office and I handed it to her."

Mr. Hefferan testified that Mrs. Mitchell had been his client for about thirteen years prior to 1909 and that all-told she had been his client for forty years. He saw Mrs. Mitchell once or twice a year, sometimes oftener. Her business was of a character which involved frequent talks with him because it covered not only her affairs, but her relatives' affairs. He saw Mrs. Mitchell on occasions between 1914 and 1929, but not as often as he had previously (Rec. 24). He has a definite recollection of seeing Mrs. Mitchell on a number of occasions during that period of time. After 1929 he did not see her as frequently; prob-

ably not more than three or four times (Rec. 25). Mr. Hefferan further testified that the first he learned of Mrs. Mitchell's death was on August 12, 1936, when Mrs. Griefen (respondent herein) accompanied by her husband came to his office to make inquiry about his dealings with Mrs. Mitchell.

Mrs. William T. Anderson testified that from May 1, 1908, to May 1, 1910 she was employed by Mr. Hefferan as secretary and stenographer. In January, 1909, she was called upon to transcribe a purported will of Harriet A. Mitchell, which had been dictated to her by Mr. Hefferan. She testified that she met Mrs. Mitchell in Mr. Hefferan's office in January, 1909 (Rec. 31); that her total contact with Mrs. Mitchell consumed probably fifteen or twenty minutes and she never saw her again after that, yet in December of 1937, almost 29 years later, upon being shown a photograph of Mrs. Mitchell by Mr. Rundall, at her home, she completely recalled the incident of her meeting Mrs. Mitchell and the circumstances attending the preparation and execution of the will of 1909. She further testified that although she wrote about twenty-four various wills while in Mr. Hefferan's employ, and she did not write this will any differently than any of the others of the twenty-four wills, and although she witnessed most of them, she was unable to recall any other will that she witnessed.

At the conclusion of this respondent's case, the Circuit court took the matter under advisement and thereafter, on April 19, 1939, entered an order admitting to probate the said destroyed will of January 21, 1909 in the form of said carbon copy. That is the order appealed from.

Three separate appeals were taken to the Appellate Court for the First District of Illinois, by several heirs at law of said deceased. One of said appeals was properly dismissed for failure to file a trial court record; the other

two appeals including your Petitioner's, were duly perfected. The parties to those appeals were represented by different attorneys, and the points raised in the respective briefs were different from each other.

The Appellate Court affirmed both appeals at the same time. However, in doing so, the Court rendered a full opinion in the other case, and thereupon made the opinion of that case binding upon this Petitioner's appeal, without in any wise passing upon the points raised by this Petitioner in his appeal, which points were not raised in the other appeal, but are separate and distinct therefrom, and are still unadjudicated.

The Appellant in the other case filed no petition for rehearing in the Appellate Court, nor a petition for leave to appeal to the Supreme Court of Illinois. This petitioner did file his petition for rehearing in the Appellate Court in which he clearly pointed out to that Court the differences in the points raised in the respective appeals and the fact that the opinion in the other case could therefore not be controlling in this case, particularly because the question of the ratification by the Testatrix of the destruction of this will, clearly urged by this Petitioner was not determined by the opinion and decision of the Appellate Court. Petitioner likewise pointed out to the Court that its failure to pass upon this issue properly raised in the Petitioner's appeal, amounts to a denial to him of substantial property rights, which has resulted in a deprivation of his property without due process of law, and to a denial of a complete legal remedy, as guaranteed to him under Article II, Sections 2 and 19 of the Constitution of Illinois, and under Section 1 of the 14th Amendment to the Constitution of the United States of America. The Appellate Court of Illinois denied the petition for rehearing and, as heretofore stated, leave to appeal to the Supreme Court of Illinois was thereafter denied.